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The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina, 110 S. Ct. 2053 (1990)

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THE DECLINE OF TRIBAL SOVEREIGNTY: THE JOURNEY FROM DICTA TO DOGMA IN *Duro v. Reina,* 110 S. Ct. 2053 (1990).

Abstract: In *Duro v. Reina,* the Supreme Court held that tribal courts do not have jurisdiction over Indians committing crimes within their territorial jurisdiction, but not belonging to their tribe. This holding is incompatible with judicial precedent as well as contemporary executive and congressional policy. The decision also creates serious practical problems for tribal, federal and state authorities by leaving a jurisdictional void over nonmember Indian criminals. A holding that tribal courts have jurisdiction over *all* tribal Indians who commit crimes on reservations would have been in harmony with judicial, congressional and executive precedent, and would not have created equal protection problems.

In the last decade the United States Supreme Court has assumed an activist role in limiting the inherent sovereignty of American Indian tribes by creating and expanding the "inherent limitations" doctrine. The latest product of this trend, *Duro v. Reina,*[1] bodes ill for tribes in its characterization of the nature of inherent tribal sovereignty, and in its indications that the Supreme Court will continue to find inherent tribal powers implicitly divested.

There is a presumption in Indian law that tribes retain all sovereign powers not expressly divested by Congress or inconsistent with the tribes' status as domestic dependent nations. The Supreme Court held in *Oliphant v. Suquamish Indian Tribe*[2] that powers inconsistent with the tribes' status were implicitly divested when the United States assumed sovereignty. Under this "inherent limitations" doctrine the tribes lost their sovereign power to assert criminal jurisdiction over non-Indians even though Congress, the primary source of Indian law and policy, had not expressly taken away that power.

Dicta in decisions following *Oliphant* suggested that assertions of tribal power over anyone other than members of the asserting tribe was likewise inconsistent. This dicta was transformed into dogma in *Duro,* in which the Court applied the inherent limitations doctrine and

1. 110 S. Ct. 2053 (1990). Congress recently passed H.R. 5803, 101st Cong., 2d Sess. (1990), overturning *Duro* until September 30, 1991. The senate conference report accompanying the bill stated that it was designed to address "an emergency situation in Indian country that is the result of a recent holding of the Supreme Court . . . known as *Duro v. Reina* . . . ." S. REP. No. 101-938, 101st Cong., 2d Sess. 132 (1990) [hereinafter "Senate Report"].

2. 435 U.S. 191 (1978).

held that tribes lack criminal jurisdiction over nonmember tribal Indians[3] who commit crimes on reservations.

The *Duro* holding is incompatible with judicial precedent, federal law, and federal policy, all of which support the development of tribal self-determination. A better holding would have upheld tribal jurisdiction over any tribal Indian who commits a crime on a reservation, based upon a theory of implied consent. The holding of the case is not the only cause for tribes to be concerned, however; the reasoning behind the holding—in particular its characterization of the nature of tribal sovereignty—indicates that the present Court may be hostile to a broad range of attempts by tribes to assert powers over anyone other than their own members.

I. THE *DURO* DECISION AND TRIBAL SOVEREIGNTY PRIOR TO *DURO*

A. The Duro *Decision*

Albert Duro was an enrolled member of the Torrez-Martinez Band of Mission Indians.[4] Duro was a resident of California and lived most of his life outside of any tribal reservation.[5] For three months Duro lived within the Salt River Indian Reservation with his girlfriend, an enrolled member of the Salt River Pima-Maricopa Indian Community (Community).[6] Duro was not eligible for membership in the Community.[7] Duro worked for the PiCopa Construction Company, which was owned by the Community.[8]

While living on the Salt River Reservation, Duro allegedly shot and killed a tribal Indian on reservation territory.[9] A federal grand jury indicted Duro for first degree murder.[10] On request by federal prosecutors the district court dismissed the indictment without prejudice[11] and placed Duro in the custody of tribal authorities.[12] The Community charged Duro with illegal discharge of a firearm within reserva-

3. *Duro,* 110 S. Ct. at 2059. Throughout this Note "nonmember tribal Indians" will refer to Indians who are enrolled members of a tribe other than the tribe asserting jurisdiction. The term does not include persons of Indian ancestry who are not enrolled in any tribe.

4. *Id.* at 2056.

5. *Id.* at 2057.

6. *Id.*

7. *Id.* at 2056. As a nonmember, Duro could not vote in tribal elections or sit on tribal juries. *Id.*

8. *Id.* at 2057.

9. *Id.* The victim was a member of a third tribe. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

tion boundaries, a violation of the Community's Code of Misdemeanors.[13]

Duro moved for dismissal in tribal court, contending the tribe lacked criminal jurisdiction over him because he was not an enrolled member of the Community.[14] The tribal court denied the motion, but the district court granted Duro's petition for habeas corpus and released him.[15] The Community appealed and the Ninth Circuit reversed, holding Duro's status as an enrolled member of an Indian tribe and his significant contacts with the Community justified tribal jurisdiction.[16] Duro appealed and the Supreme Court reversed.[17]

The Supreme Court rejected the Community's argument that its retained sovereign powers gave it jurisdiction over Duro. According to the Court, criminal jurisdiction over Duro was inconsistent with the tribe's status as a dependent of the United States.[18]

B. Tribal Sovereignty and Tribal Criminal Jurisdiction Before Duro

The *Duro* case must be examined in context with the rich historical background of Indian law, which dates back to the birth of our nation.[19] An understanding of this context is necessary to evaluate the impact of the *Duro* decision.

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13. *Id.* at 2058. The Indian Civil Rights Act (ICRA), Pub. L. No. 90-284 (codified at 25 U.S.C. §§ 1301–1303 (1988)), limits the penalties a tribal court may impose to one year in jail and a $5000 fine. The Federal Major Crimes Act, ch. 341 § 9 (codified as amended at 18 U.S.C. § 1153 (1988)) provides for federal jurisdiction over 14 major offenses occurring in Indian country, including murder. Although tribal courts may have concurrent jurisdiction over the crimes listed in the Major Crimes Act when committed by tribal members on reservations, the practical consequence of the ICRA penalties limitation is that tribal criminal codes cover only misdemeanors.

14. *Duro,* 110 S. Ct. at 2058.

15. Duro v. Reina, 12 Indian L. Rep. (Am. Indian Law. Training Program) 3003 (D. Ariz. 1985), *rev'd,* 821 F.2d 1358 (9th Cir. 1987), *revised,* 851 F.2d 1136, *rev'd,* 110 S. Ct. 2053 (1990). The court reasoned that because tribes lack criminal jurisdiction over non-Indians under *Oliphant,* subjecting nonmember Indians to tribal jurisdiction would constitute invidious racial discrimination in violation of ICRA.

16. Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987), *revised,* 851 F.2d 1136, *reh'g denied,* 860 F.2d 1463 (9th Cir. 1988), *rev'd,* 110 S. Ct. 2053 (1990).

17. *Duro,* 110 S. Ct. at 2059. The decision resolved an inter-circuit conflict. The Eighth Circuit had held in Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988), that tribes lacked such jurisdiction.

18. For a discussion of the Court's rationale, see *infra* notes 40–54 and accompanying text.

19. History is particularly important in Indian law:

> Indian law itself is one of the most historical of all areas of law. . . . [I]t is an historical truth (if there can be such a thing) that this collection of doctrines and decisions we call Indian law is merely an expression of Indian policy. And that policy is little more than the collected value judgments of society at any given moment: a matter of history. Indian law grows from, and is merged in, the historical experience.

1. Inherent Tribal Sovereignty

When the United States became dominant sovereign, the tribes became, in the words of Chief Justice Marshall, "domestic dependent nations."[20] As such, the tribes retained their "inherent" sovereign powers except where those powers were diminished by the overriding sovereignty of the United States.[21] Both Congress and the courts can impact this retained sovereignty.

Congress has plenary power over the tribes and can diminish or extinguish tribal powers at will.[22] The legal and historical relationship between Congress and the tribes has led Congress to assume a unique trust responsibility over Indian tribes.[23] Congress is responsible for the welfare and interests of the tribes and for balancing Indian and non-Indian interests when they come in conflict.[24] Congress has occa-

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Strickland, *Introduction to Indian Law Symposium—Indian Law and Policy: The Historian's Viewpoint,* 54 WASH. L. REV. 475 (1979).

20. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1823).

21. United States v. Wheeler, 435 U.S. 313, 322 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *see also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 231–32 (1982 ed.):

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.

McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973), diminished the importance of inherent tribal sovereignty in the context of conflicts between state and tribal sovereignty. *McClanahan* held that in such disputes courts should look first to federal statutes and treaties to determine the extent of exclusive tribal authority, viewing retained tribal sovereignty as a "backdrop" to that analysis. *Id.* at 172–73. Inherent tribal sovereignty has continued to be a determinative factor where state power is not at issue, however. *See, e.g.,* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); *Wheeler,* 435 U.S. at 322; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195–96 (1978).

22. *Wheeler,* 435 U.S. at 323 (1978); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). Congress's plenary power over the tribes is drawn from the Indian commerce clause, U.S. CONST. art. I, § 8, cl. 3. Morton v. Mancari, 417 U.S. 535, 551–52 (1974).

23. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STAN. L. REV. 979, 992–1009 (1981). The federal status of Indian affairs grew out of conflicts between the budding states and the tribes. *Id.* at 992. The threat of wars from these conflicts prompted the framers to adopt the Indian commerce clause, U.S. CONST. art. I, § 8, cl. 3, which gave the federal government exclusive power over commerce with the tribes. *Id.* at 993. Judicial decisions, beginning with *Worcester,* 31 U.S. (6 Pet.) at 515, recognized the relationship as a trusteeship and this perception continues today. *Id.* at 1002.

24. Of course, not all of Congress'ss actions in pursuit of this responsibility have benefited the tribes. For example, the allotment and termination policies, ostensibly enacted to benefit Indians by forcibly integrating them into mainstream society, were ultimately disastrous to tribal interests. Clinton, *supra* note 23, at 1020–27. Over the last two decades Congress and the Executive branch have attempted to fulfill their responsibility toward the tribes in a less paternalistic fashion than in the past, by encouraging tribal self-determination. *Id.* at 1004; *see infra* notes 28–29 and accompanying text.

sionally limited the sovereign powers of the tribes through treaties and statutes.[25]

Tribal powers may also be diminished through judicial action. The Supreme Court has held that certain powers were implicitly given up by the tribes as a necessary consequence of their acceptance of United States "protection."[26] The Court does not actually take powers away from tribes under the inherent limitations doctrine; rather, the doctrine recognizes that the powers ceased to exist when the United States became primary sovereign.[27]

2. *The Federal Policy of Encouraging Tribal Self-Determination*

Since 1970, federal policy has strongly supported the growth and independence of tribal governments.[28] This policy is reflected in executive and congressional policy statements and in federal statutes.[29]

3. *Tribal Jurisdiction Within Federal Criminal Jurisdictional Statutes*

Congressional statutes define the scope of federal criminal jurisdiction within reservation lands. In 1817, Congress extended federal criminal law to Indian country.[30] The statute specifically limited the extension of federal jurisdiction to crimes involving non-Indians, however, stating that nothing in the act "shall be so construed as . . . to

25. For example, ICRA, 25 U.S.C. § 1302 (1988), imposes procedural protections upon tribal courts similar to those in the Bill of Rights, and limits the penalties tribal courts can impose.

26. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The *Oliphant* Court maintained that this principle was implicit in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (holding tribes did not possess title to reservation lands, the United States having exclusive title by right of discovery), and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (stating in dicta that "any attempt by [foreign nations] to acquire [tribal] lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility"). *Oliphant,* 435 U.S. at 209.

27. *Oliphant,* 435 U.S. at 210 ("By submitting to the overriding sovereignty of the United States, [the] tribes necessarily g[a]ve up their power . . . .").

28. *See generally* Clinton, *supra* note 23, at 980 n.3; Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 WASH. L. REV. 479, 483 (1979); Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy,* 56 TEX. L. REV. 1195 (1978).

29. *See, e.g.,* S. REP. NO. 101-938, 101st Cong., 2d Sess. (1990); Indian Self-Determination & Educational Assistance Act, 25 U.S.C. §§ 450a–450n (1988); Statement on Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 24, 1983); Message From the President of the United States, Transmitting Recommendations for Indian Policy, 6 WEEKLY COMP. PRES. DOC. 894 (July 8, 1970).

30. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (repealed 1834). "Indian country" is defined, in part, in 18 U.S.C. § 1151 (1988) as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . ."

extend to any offence committed by one Indian against another, within any Indian boundary."[31]

Congress continued to exempt Indian-against-Indian crimes from federal jurisdiction in section 25 of the Indian Trade and Intercourse Act of 1834,[32] and again in its successor statute, the Indian Country Crimes Act.[33] The Indian Country Crimes Act extended federal law to Indian country, but expressly provided that it would not apply to:

> offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[34]

The legislative history of the Act indicates that Congress intended for the exception to extend to *all* tribal Indians, without regard to the relationship between the Indian and the tribe asserting jurisdiction.[35]

The Supreme Court and the Executive branch recognized that the exception extended to Indians generally. In *United States v. Rogers*,[36] the Court held that the Indian-against-Indian exception had nothing to do with tribal membership.[37] And in 1883 the Solicitor General wrote an opinion, later approved by the Attorney General, concluding that the federal courts did not have jurisdiction to try a Creek Indian for the murder of an Arapaho Indian within the Pottawatomie Reservation.[38] The opinion indicated that the "concerned" tribes would

31. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (repealed 1834).

32. ch. 161, 4 Stat. 729 (repealed in part) (codified as carried forward and amended at 18 U.S.C. §§ 1152, 1160, 1165, 25 U.S.C. §§ 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, 264).

33. 18 U.S.C. § 1152 (1988) This statute (often referred to as the "General Crimes Act") descends from laws enacted between 1778 and 1871. F. COHEN, *supra* note 21, at 287.

34. 18 U.S.C. § 1152 (1988).

35. H.R. Rep. No. 474, 23d Cong., 1st Sess. 13 (1834) (emphasis in original):

> It will be seen that we cannot, consistently with the provisions of some [of] our treaties, and of the territorial act, extend our criminal laws to offences committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, *at any place* within their own limits.

36. 45 U.S. (4 How.) 567 (1846).

37. The *Rogers* Court rejected the argument that a crime involving two non-Indians who had been adopted into an Indian tribe fell within the Indian-against-Indian exception, stating "[the exception] does not speak of members of a tribe, but of the race generally—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." *Id.* at 573.

38. 17 Op. Att'y Gen. 566 (1883).

have jurisdiction over the crime if they approved laws "substantially conformable to natural justice."[39]

C. *The* Duro *Court's Analysis*

It was in the context of the principles of Indian law just described that the *Duro* Court considered the limits of tribal sovereignty. The Salt River Community claimed that inherent tribal sovereignty gave it criminal jurisdiction over all tribal Indians, both members and nonmembers, who commit crimes covered by its criminal code within its reservation.[40] The Court disagreed.[41]

The Court began by noting that *Oliphant v. Suquamish Indian Tribe*[42] and *United States v. Wheeler*[43] provided the "analytic framework" for its decision, although in neither of those cases was the issue of the inherent power of tribes over nonmember Indians before the Court.[44] *Oliphant* held that the criminal jurisdiction of tribes over non-Indians was implicitly divested under the inherent limitations doctrine.[45] *Wheeler* held that it was not double jeopardy for a tribal Indian to be convicted in both tribal and federal courts for offenses arising out of the same incident.[46] The Court reasoned that *Duro* was "at the intersection of these two precedents, for here the defendant is an Indian, but not a member of the Tribe that asserts jurisdiction."[47]

39. *Id.* at 570.

40. *See* Duro v. Reina, 110 S. Ct. 2053, 2059 (1990).

41. *See id.* at 2056.

42. 435 U.S. 191 (1978).

43. 435 U.S. 313 (1978).

44. *Duro,* 110 S. Ct. at 2059.

45. *Oliphant,* 435 U.S. at 210. The opinion focused upon an historical analysis of the relationship between Indian tribes and non-Indians. *Id.* at 197–208. Its holding was based upon two tenets: (1) Congress, the Executive branch, and the courts shared an historical presumption that tribes did not have criminal jurisdiction over non-Indians, and this historical presumption carries "considerable weight"; and (2) tribes were implicitly divested of criminal jurisdiction over non-Indians as a necessary consequence of their dependent status (the "inherent limitations" doctrine). *Id.* at 209–12. Tribal courts are not subject to the Bill of Rights. *See, e.g.,* Talton v. Mayes, 163 U.S. 376 (1896) (fifth amendment does not apply to tribal prosecutions). They are, however, subject to ICRA, 25 U.S.C. § 1302 (1988), which provides most of the same protections. The *Oliphant* Court found that it would be inconsistent with the importance the United States places upon criminal procedural rights to allow non-Indians to be tried in courts in which constitutional protections do not apply. 435 U.S. at 210.

46. *Wheeler,* 435 U.S. at 329–30. The defendant in *Wheeler* pleaded guilty in the court of his tribe to disorderly conduct and contributing to the delinquency of a minor. He was later indicted in federal court for statutory rape based upon the same incident. This was not double jeopardy, the Supreme Court held, because a tribe's criminal jurisdiction over its own members is derived from retained sovereignty and not from the sovereign power of the United States. *Id.*

47. *Duro,* 110 S. Ct. at 2059.

The Court determined that *Oliphant, Wheeler,* and later cases established a rule that inherent tribal powers are limited to matters concerning the tribes' "internal relations."[48] Criminal jurisdiction over Duro did not involve the Community's internal relations because Duro was not a member of the Community, and "[f]or purposes of criminal jurisdiction, [Duro's] relations with [the Community] are the same as the non-Indian's in *Oliphant.*"[49] Duro, the Court noted, is a Unites States citizen, and thus "share[s] in the territorial and political sovereignty of the United States."[50] The Court asserted that "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members,"[51] and because Duro had not consented to be a member, the tribe had no jurisdiction over him.[52]

The Court found support for its position in five Solicitor General opinions that it claimed "provide[d] the most specific historical evidence on the question."[53] The Court dismissed the statutory scheme of federal criminal jurisdiction as irrelevant to issues of tribal jurisdiction.[54]

II. THE *DURO* DECISION IS BAD LAW AND BAD POLICY

The *Duro* decision is incompatible with judicial precedent and with the federal jurisdictional scheme. Its consent-based characterization of tribal sovereignty is contrary to the understandings of prior courts, the federal government, scholars, and the tribes. *Duro* is the latest in a series of decisions actively diminishing the sovereignty of Indian tribes through expansion of judicially-created dogma. It will cause unnecessary trouble for tribes and endanger reservation inhabitants.

48. *Id.* at 2060.

49. *Id.* at 2061, 2063. The Court cited language distinguishing between members and nonmembers in Montana v. United States, 450 U.S. 544, 565 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161 (1980); and *Wheeler,* 435 U.S. at 326. *Duro,* 110 S. Ct. at 2060–61; *see infra* notes 82–92 and accompanying text. It also noted that Duro could not vote in tribal elections, hold tribal office, or sit on tribal juries. *Duro,* 110 S. Ct. at 2061. The Court recognized that tribes could assert civil jurisdiction over nonmembers, but explained that criminal jurisdiction "involves a far more direct intrusion on personal liberties." *Id.*

50. *Id.* at 2063.

51. *Id.*

52. Kennedy wrote for the majority: "A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority." *Id.* at 2064.

53. *Id.* at 2063.

54. *Id.* at 2062.

A. *The* Duro *Holding Is Inconsistent With the Reasoning of* Oliphant *and With the Congressional Intent Implicit in the Federal Criminal Jurisdictional Scheme*

The *Duro* decision is inconsistent with the rationale of *Oliphant v. Suquamish Indian Tribe,*[55] and also frustrates Congress's apparent desire to leave non-felony inter-tribal crimes[56] to the jurisdiction of tribal courts. A straightforward application of the *Oliphant* analysis would have supported tribal jurisdiction in *Duro,* and a logical interpretation of the federal jurisdictional scheme would have revealed Congress's intent to preserve tribal jurisdiction over inter-tribal crimes.

In *Oliphant,* the Court held that the historical presumption by Congress, the Executive branch, and the courts that the tribes lacked criminal jurisdiction over non-Indians carried "considerable weight."[57] The *Oliphant* Court devoted much of its opinion to showing that this presumption existed.[58] Applying the same analysis to *Duro* would have resulted in a holding in favor of tribal jurisdiction, for the federal government's historical reluctance to assert jurisdiction over inter-tribal crimes implies a presumption by Congress that the tribes had jurisdiction over such crimes.[59]

The federal criminal statutory scheme deliberately excluded Indian-against-Indian crimes from federal jurisdiction.[60] Neither the statute nor its legislative history refers to tribal membership.[61] Furthermore, the courts and the Executive apparently agreed that the exception applied to Indians generally, regardless of whether they were members

55. 435 U.S. 191 (1978).

56. The term "inter-tribal crimes" refers in this Note to crimes committed by individual tribal Indians within the jurisdiction of a tribe other than the one to which they belong.

57. *Oliphant,* 435 U.S. at 206; *see supra* note 45.

58. *Oliphant,* 435 U.S. at 197–206. The Court's historical analysis was sharply criticized by commentators. *See, e.g.,* Collins, *supra* note 28, at 490–99.

59. As a Senate committee recently stated in support of HR 5803 (overturning *Duro* for one year): "Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members." Senate Report, *supra* note 1, at 133.

60. 18 U.S.C. § 1152 (1988); *see supra* notes 30–39 and accompanying text.

61. 18 U.S.C. § 1152 (1988); H.R. REP. No. 474, 23d Cong., 1st Sess. 13 (1834); *see supra* notes 30–35 and accompanying text.

of the forum tribe.[62] The states also lacked jurisdiction over such crimes.[63]

Two conclusions are possible from this set of circumstances: either (1) Congress presumed that tribes had no jurisdiction over inter-tribal crimes, and intentionally created a jurisdictional scheme in which no entity would have jurisdiction; or (2) Congress presumed that tribes had jurisdiction over such crimes, and left that jurisdiction intact with the Indian-against-Indian exception. Only the second interpretation makes sense of the statutes and their legislative history. Congress's deliberate refusal to extend federal jurisdiction over inter-tribal crimes, the Supreme Court's recognition that the exception was not based upon tribal membership, and the Solicitor General's opinion that the federal government did not have jurisdiction over an inter-tribal crime, demonstrate that all three branches historically shared a presumption that tribes possessed jurisdiction over such crimes. The *Duro* Court relied heavily upon *Oliphant,* yet failed to explain why the presumption in favor of tribal sovereignty evidenced by section 1152 was not entitled to the same weight as the *Oliphant* court gave to the contrary presumption.[64]

The *Duro* Court also overlooked the significance of the fact that the Indian-against-Indian exception reflected Congress's *desire* to have tribal courts assert jurisdiction over inter-tribal crimes. The Court skirted the issue by dismissing the federal scheme as relevant only to issues of federal jurisdiction.[65] However, the tribes did not contend that federal statutes *gave* tribes jurisdiction over inter-tribal crime. Instead they argued that Congress promulgated the Indian-against-Indian exception out of a desire to leave the recognized jurisdiction of the tribes over such crimes intact. *Oliphant* recognized the importance of Congress's intentions by stating that tribes gave up their power to

62. Unites States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846); 17 Op. Att'y Gen. 566 (1883); *see supra* notes 36–39 and accompanying text.

63. At the time § 1152 was passed states only had jurisdiction within reservations over crimes between non-Indians. Although early Supreme Court decisions held states had little or no authority within tribal reservations, *see, e.g.,* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), the Court later held that state jurisdiction extended into Indian country where a crime involved only non-Indians. United States v. McBratney, 104 U.S. 621 (1882).

64. The limited historical analysis done by the *Duro* Court was selective and self-serving. The Court simply ignored evidence contrary to its conclusions, such as 17 Op. Att'y Gen. 566 (1883); see *supra* note 38 and accompanying text. The Court also chose to ignore evidence that the tribes had asserted jurisdiction over nonmember Indians for years, *see* Brief Amici Curiae on Behalf of Six American Tribes at 2–6, Duro v. Reina, 110 S. Ct. 2053 (1990) (No. 88-6546), although the *Oliphant* Court found it significant that tribes had not traditionally exercised jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 (1978).

65. *Duro v. Reina,* 110 S. Ct. 2053, 2062 (1990).

try non-Indian citizens "except in a manner acceptable to Congress."[66] Clearly tribal jurisdiction over inter-tribal crimes was acceptable to Congress, or Congress would not have included the Indian-against-Indian exception in section 1152.[67]

In sum, unless the Court meant to imply that Congress intentionally created a jurisdictional void when it enacted the Indian-against-Indian exception, the Court necessarily imposed its implicit divestiture holding over the shared contrary presumptions of Congress, the Executive, and prior Courts, in contravention of the reasoning in *Oliphant.*

B. The Duro *Holding Is Inconsistent With the Historical Nature of Tribal Sovereignty*

The *Duro* Court's assertion that residual tribal sovereignty is "but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members"[68] is inconsistent with prior understandings of the nature of tribal sovereignty. Tribal governments have traditionally been viewed as similar to other sovereign governments, except that they lack powers expressly divested by Congress or inconsistent with their dependent status.[69] Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory."[70] They are "a good deal more than 'private, voluntary organizations.' "[71] Their sovereign powers had never previously been held to be based upon consent; in fact, a prior case, *Merrion v. Jicarilla Apache Tribe,*[72] expressly rejected a consent-based theory of tribal sovereignty.

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66. *Oliphant,* 435 U.S. at 210. The *Duro* Court hinted, however, that Congress may not have the power to subject citizens to the jurisdiction of courts not bound by the Bill of Rights. *Duro,* 110 S. Ct. at 2064 (citing Reid v. Covert, 354 U.S. 1 (1957), which held unconstitutional an attempt by Congress to subject the wives of American servicemen abroad to trial by military tribunals without the protection of the fifth and sixth amendments).

67. Rather than divest the tribes of jurisdiction, Congress made tribal courts compatible with modern principles of criminal justice by passing ICRA, 25 U.S.C. § 1302 (1988), which provides most of the same protections as the Bill of Rights, and which limits the penalties tribal courts can impose.

68. *Duro,* 110 S. Ct. at 2063; *see supra* notes 51–52 and accompanying text.

69. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555, 557, 561 (1832); F. COHEN, *supra* note 21, at 231–32.

70. United States v. Mazurie, 419 U.S. 544, 557 (1975) (holding that tribal sovereignty was sufficient to support a congressional delegation of authority to control non-Indian liquor sales on fee land within Indian country); *see also* United States v. Wheeler, 435 U.S. 313, 326 (1978) (holding double jeopardy clause did not bar an Indian from being tried in federal and tribal court for the same offense).

71. *Mazurie,* 419 U.S. at 557.

72. 455 U.S. 130 (1982).

The *Merrion* majority held that it was within the inherent sovereign powers of an Indian tribe to impose a severance tax on non-Indian oil and gas companies. Justice Stevens dissented, arguing that because the companies could not participate in tribal government, imposition of the tax went against the "fundamental principle" that "in this nation each sovereign governs only by the consent of the governed."[73]

The *Merrion* majority explained that Stevens had "confuse[d] the Tribe's role as commercial partner with its role as sovereign,"[74] and that

> [c]onfusing these two results denigrates Indian sovereignty.
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> . . . .
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> . . . Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority. Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself. . . . Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.[75]

The new majority in *Duro* simply ignored this recent rejection of its theory of tribal sovereignty.

The *Duro* Court construed *Wheeler* to implicitly define the tribes' retained sovereignty as "that needed to control their own *internal relations,* and to preserve their own unique customs and social order."[76] Yet the Court had previously held that tribes have civil jurisdiction over nonmembers.[77] Although the Court distinguishes between civil and criminal jurisdiction by stating that the latter involves a greater intrusion into personal liberties,[78] the Court does not explain how criminal jurisdiction is any less an aspect of the internal relations of tribes than civil jurisdiction. In fact, criminal jurisdiction over nonmembers is logically more closely related to tribes' internal relations, because the maintenance of law and order on reservations more directly impacts the preservation of the tribes' "unique customs and

73. *Id.* at 173 (Stevens, J., dissenting) (quoting Nevada v. Hall, 440 U.S. 410, 426 (1979)). Justice Stevens contended that the companies could only have consented to be taxed contractually in their lease agreement, which they had not done. *Id.* at 186.

74. *Id.* at 145.

75. *Id.* at 146–47.

76. Duro v. Reina, 110 S. Ct. 2053, 2060 (1990) (emphasis added).

77. Williams v. Lee, 358 U.S. 217 (1959).

78. *Duro,* 110 S. Ct. at 2061.

social order." The Court makes no attempt to reconcile this inconsistency.

No other sovereignty remotely resembles the consent-based model that the *Merrion* dissent and the *Duro* Court describe. Despite the "fundamental principle" that all democratic governments rule by the consent of the governed, the sovereign powers of governments are not dependent upon the willingness of individuals to submit to them. For example, one need do nothing more than commit a crime within United States territory to place oneself within the jurisdiction of U.S. courts.[79] Similarly, commission of a crime within a state subjects the nonresident to state jurisdiction.[80] The power asserted by these sovereigns has little to do with the consent of individuals. If there is any consent at all it is implied by the act of entering the jurisdiction. Nor is sovereign authority based upon the participation of individuals in government. If it were, United States jurisdiction over aliens and state jurisdiction over nonresidents would be improper.

The closest parallel to the *Duro* Court's notion of tribal "sovereignty" is a voluntary club which conditions membership upon submission to club rules. But past decisions made it clear that tribes are "a good deal more than 'private, voluntary organizations.' "[81]

The "consent" theory of tribal sovereignty has no basis in statute, judicial precedent, or the Constitution. Its only real basis is in the natural law arguments of the present majority. Justice Kennedy asserts that "[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[82] With this assertion a large measure of tribal sovereignty ceased to exist.

C. *The* Duro *Holding Is the Result of an Activist Expansion of the Inherent Limitations Doctrine*

Over the last decade the Supreme Court has assumed an activist role in unilaterally decreasing the scope of retained tribal sovereignty. Where federal law is unclear as to the extent of tribal authority, a less active Court would begin with the established presumptions that tribal

79. 21 AM. JUR. 2D *Criminal Law* § 343 (1981). In fact, the United States claims jurisdiction over a number of crimes committed by aliens *outside* of its borders. *See* United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1068–69 nn. 1–4 (1990) (Brennan, J., dissenting).

80. 21 AM. JUR. 2D *Criminal Law* § 343 (1981).

81. United States v. Mazurie, 419 U.S. 544, 557 (1975).

82. *Duro,* 110 S. Ct. at 2063.

powers exist until divested,[83] and that ambiguities in federal law are to be resolved in favor of the tribes.[84] It would then look to federal policy, which favors tribal self-determination.[85] Recognizing that Congress is the proper body to determine which powers, if any, should be taken from the tribes, the Court would conclude that tribal powers should be presumed retained unless Congress has divested them. Instead, the Supreme Court has ignored federal policy and expanded the judicially-created doctrine of inherent limitations to divest tribes of broad powers, largely on the basis of dicta from its own recent precedent.

Despite their dicta, none of the decisions prior to *Duro* mandated the *Duro* holding. Neither *Oliphant* nor *Wheeler* dealt with the inherent powers of tribes over nonmember Indians.[86] However, dicta in the *Wheeler* opinion implied that *Oliphant* had reached the issue:

> The areas in which such [an] implicit divestiture of [tribal] sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . . [W]e have recently held [that tribes] cannot try nonmembers in tribal courts. [citing *Oliphant*].[87]

Justice Stewart's overbroad characterization of *Oliphant* was repeated in a series of later decisions. One of the issues in *Montana v. United States*[88] was whether a tribe's inherent sovereignty included the power to regulate non-Indian hunting and fishing on fee lands located within its reservation. The Court held that it did not, citing the above-quoted language from *Wheeler,* and stating:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.[89]

This statement further distorts the *Oliphant* opinion. The principles *Oliphant* relied upon were the historical understandings of the three branches of government and the relationship between tribes and non-Indian criminals. These "principles" did not support the excessively

83. United States v. Wheeler, 435 U.S. 313, 323 (1978); *see supra* note 21 and accompanying text.

84. Bryan v. Itasca County, 426 U.S. 373, 392 (1976); McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973).

85. *See supra* notes 28–29 and accompanying text.

86. *See supra* notes 45–46 and accompanying text.

87. United States v. Wheeler, 435 U.S. 313, 326 (citations omitted).

88. 450 U.S. 544 (1981).

89. *Id.* at 565.

broad general proposition that tribal authority cannot extend over nonmembers of the tribe.

This general proposition appeared again in the dissenting opinion in *Merrion v Jicarilla Apache Tribe,*[90] and finally, in Justice White's plurality/dissent in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation.*[91] In *Brendale,* Justice White contended in dissent that all tribal regulation of fee land within a reservation was improper unless necessary to protect the health, safety and welfare of the tribe. Justice White asserted that *Wheeler* "made [it] clear" that "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested."[92] Justice White does not explain how a case dealing with the double jeopardy implications of bringing separate tribal and federal prosecutions against a tribal Indian could make any such broad proposition "clear" as a matter of law.

Neither *Oliphant, Wheeler,* nor any of the cases misconstruing their holdings in dicta disposed of the issue of retained tribal powers over nonmember tribal Indians. The misstatements in these cases are not inadvertent, however, as the concrete holding of *Duro* makes clear. They represent an activist approach to lawmaking: turning narrow holdings into sweeping legal propositions which are then applied to a broad range of controversies fundamentally different than that from which the "rule" is derived.[93] Thus, a decision holding that tribes implicitly gave up the power to sell land, and a later decision holding that tribes similarly lost criminal jurisdiction over non-Indians, turn with a stroke of the judicial pen into holdings that purport to extinguish tribal sovereignty over all nonmembers. This type of judicial activism is particularly inappropriate in the realm of Indian law, where law and tradition have made Congress the protector and overseer of the tribes.

90. 455 U.S. 130 (1982). Discussed *supra* at notes 72–75.

91. 109 S. Ct. 2994 (1989). Justice White wrote part of the plurality opinion and dissented to another part.

92. *Id.* at 3006.

93. Of course, a willingness to label a particular line of decisions "activist" seems to depend to a large extent upon whether one's toes are the ones being trampled. However, there is general agreement that judicial restraint envisions deciding cases on the narrowest possible grounds. *See, e.g.,* Riggs & Proffitt, *The Judicial Philosophy of Justice Rehnquist,* 16 AKRON L. REV. 555, 566 (1983).

D. *The* Duro *Holding Creates Legal and Practical Problems for Controlling Non-felony Crime on Reservations*

The *Duro* holding creates both a de jure and a de facto jurisdictional void over misdemeanor crimes committed by nonmember tribal Indians on reservations. This complex jurisdictional problem may force tribes to accept unwanted state jurisdiction, contrary to federal policy. Almost all of the tribes will be adversely affected in light of their significant nonmember Indian populations.[94]

The *Duro* holding creates a de jure jurisdictional void under the federal criminal jurisdictional scheme. The Major Crimes Act only applies to fourteen felonies, and section 1152 exempts other inter-Indian crimes from federal coverage. States which have not obtained jurisdiction under PL 280 also lack jurisdiction over such crimes.[95] Thus, as a result of *Duro,* on many reservations no authority has jurisdiction over non-felony inter-tribal crimes.[96]

The *Duro* Court glosses over the de jure jurisdictional problem by stating it is a problem for Congress, and furthermore, that tribes can submit to state jurisdiction under PL 280.[97] However, extension of

94. Census data for 201 of the 278 listed tribes indicates that at least 24,450 enrolled Indians live on reservations of tribes other than those in which they are enrolled. The average nonmember population is 14%, with over half of all reported reservations containing nonmember populations of 10% or more. United States Brief as Amicus Curiae at 19 n.27, Duro v. Reina, 110 S.Ct 2053 (1990) (No. 88-6546) (citing 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, Table 4, pt. 2, at 27 (1986)).

95. *See* Duro v. Reina, 110 S. Ct. 2053, 2070 n. 3 (1990) (Brennan, J., dissenting) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)); *see also supra* note 63. Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, 28 U.S.C. § 1360), gave six states criminal and civil jurisdiction over Indian country within their borders, and allowed others to assume jurisdiction at will. Ten states accepted some degree of jurisdiction under the Act. F. COHEN, *supra* note 21, at 362. Only Florida assumed the full degree of Pub. L. 280 jurisdiction. *Id.* at 362 n.125. Since a 1968 amendment requiring tribal assent to further assumptions of state jurisdiction, only one state has obtained jurisdiction under the Act. *Id.* at 362–63.

96. As a Senate committee recently stated:

> In at least twenty states with substantial Indian populations, the [*Duro*] decision has created a jurisdictional void in which neither a tribe, a state, or the Federal government is exercising jurisdiction over crimes committed by non-tribal member Indians in Indian country.
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> . . . .
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> . . . [U]nless the Congress acts to fill this jurisdictional void, those who identify themselves as Indian and are recognized under Federal law (18 U.S.C. 1153) as Indian, may come onto an Indian reservation, commit a criminal misdemeanor, and know that there is no governmental entity that has the jurisdiction to prosecute them for their acts. Such is the situation across Indian country since the Court's ruling in May.

Senate Report, *supra* note 1 at 132.

97. *Id.* at 2065–66. The Court also noted, without expressing an opinion on the matter, that federal jurisdiction might be obtained by interpreting § 1152 to mean "tribal member" where it says "Indian," *id.* at 2066, and that tribes retain the power to exclude undesirables from their

state jurisdiction over Indian country is directly contrary to the federal policy of promoting tribal self-sufficiency,[98] and has been universally rejected by the tribes.[99]

Even if tribes wished to submit to state jurisdiction, most states have neither the will nor the means to enforce minor criminal laws within reservations, many of which are remotely located.[100] The tribes are the logical body to handle enforcement of these crimes, because they have the most direct interest and closest enforcement resources.

E. A Better Answer: Tribal Sovereignty Over Nonmember Tribal Indians Based on Implied Consent

The *Duro* court should have held that all Indians who are members of a tribe are subject to the criminal jurisdiction of any reservation upon which they commit a crime, under an implied consent theory. This would balance the interests of the tribes against the interests of individual Indians; for Indians who do not wish to fall under a particular tribe's jurisdiction could either refrain from entering its jurisdiction or relinquish tribal membership, along with the benefits that accompany such membership.

1. The Supreme Court Correctly Rejected the Ninth Circuit's Significant Contacts Approach

The Court was correct to reject the Ninth Circuit's "significant contacts" approach to defining tribal criminal jurisdiction. Under that approach, nonmembers would be subject to tribal jurisdiction only when their contacts with the tribe were sufficient to justify it.[101] This approach, similar to the "minimum contacts" doctrine used to determine state civil jurisdiction,[102] is inappropriate for criminal jurisdiction. A person who has endangered the health, safety and welfare of

lands. *Id.* at 2065–66. There are problems with both of these suggestions. The problem with the former is that § 1152 has not been so interpreted, and even if it were, federal authorities are reluctant to expend scarce resources enforcing misdemeanor crimes on reservations. T. Maloney, Comments at The Fourth Annual Western Regional Indian Law Symposium (Sept. 20–21, 1990) (notes on file with the *Washington Law Review*). There are numerous problems with the latter approach. For example, nonmembers who own fee land on reservations cannot be excluded. F. COHEN, *supra* note 21, at 252. Furthermore, excluding nonmembers with family ties to members of the tribe can hurt innocent parties. Maloney, *supra.* Finally, it is difficult to enforce exclusion orders on reservations with open boarders. *Id.*

98. *See supra* notes 28–29.

99. *See* F. COHEN, *supra* note 21, at 363.

100. *See* REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 145 (GPO 1981).

101. Duro v. Reina, 851 F.2d 1136, 1144 (9th Cir. 1987), *rev'd,* 110 S. Ct. 2053 (1990).

102. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

reservation residents by committing a crime has undoubtedly established sufficient contacts to alleviate due process concerns. It would be impractical and unnecessary to require tribal courts to perform a complex analysis of interests for every minor crime within their jurisdiction.

2. *The Court Erred in Failing to Adopt an Implied Consent Approach*

Applying an implied consent approach to inter-tribal crimes would have avoided the jurisdictional void created by the *Duro* holding and would have been consistent with established notions of tribal sovereignty. It would not have created the due process problems envisioned by the district court.

a. *An Implied Consent Approach Would Be Consistent With Historical Notions of Tribal Sovereignty*

Under traditional notions of sovereignty, Indian tribes have the responsibility of preserving law and order within their reservations. The power to carry out this responsibility has not been relinquished by the tribes; nor has it been taken away by Congress, except where major crimes and crimes involving non-Indians are concerned.[103] On the contrary, Congress has always apparently assumed that the tribes had such power,[104] and has recently encouraged its development.[105] Tribal sovereignty over nonmember tribal Indians has thus traditionally been viewed as similar to state sovereignty over nonresidents.[106] The tribal authority envisioned by the *Duro* Court, in contrast, is not sovereignty at all, but a new judicial creation divorced from traditional notions and adaptable to the whims of the Court.

b. *An Implied Consent Approach Would Not Violate Constitutional Principles*

The district court held that because tribes could not assert criminal jurisdiction over non-Indians after *Oliphant,* subjecting nonmember tribal Indians to such jurisdiction would be a purely racial classification, contrary to the equal protection requirements of ICRA.[107] The *Duro* majority also stated that as a U.S. citizen, Duro was entitled to

103. *See supra* notes 13, 30–39 and accompanying text.

104. *Id.*

105. *See supra* notes 28–29 and accompanying text.

106. *See supra* notes 70–74 and accompanying text.

107. Duro v. Reina, 12 Indian L. Rep. (Am. Indian Law. Training Program) 3003 (D. Ariz. 1985), *rev'd,* 821 F.2d 1358 (9th Cir. 1987), *revised,* 851 F.2d 1136, *rev'd,* 110 S. Ct. 2053 (1990).

the same constitutional protections as a non-Indian.[108] The *Duro* Court did not reach the equal protection issue, however, because its holding on inherent limitations grounds disposed of the case.

A ruling that tribal courts have criminal jurisdiction over nonmember tribal Indians would not violate ICRA or the United States Constitution. It would not violate ICRA because ICRA only requires tribal courts to treat everyone within their jurisdiction equally.[109] Under *Oliphant,* non-Indians do not fall within tribal jurisdiction.

Nor would it be a racial classification violating the United States Constitution, for the simple reason that tribal membership is not a racial classification. Tribal membership is a voluntary affiliation; race is a necessary but not exclusive element.

The Supreme Court has made it clear that federal legislation treating tribal Indians differently as a class is not based upon an unconstitutional racial classification. In *United States v. Antelope,*[110] the Court stated:

> The decisions of this court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with the Indians.[111]

Similarly, in *Fisher v. District Court*[112] the Court held that a tribal ordinance denying tribal members access to state court by giving the tribe exclusive jurisdiction over the adoption of tribal children did not constitute impermissible racial discrimination because "[t]he exclusive jurisdiction does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the [tribe] under federal law."[113]

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108. Duro v. Reina, 110 S. Ct. 2053, 2063. ("Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.' ") (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

109. 25 U.S.C. § 1302(8) (1988).

110. 430 U.S. 641 (1977).

111. *Id.* at 645 (citations omitted). The case involved two tribal Indians who were convicted under the federal felony-murder rule of first degree murder. Premeditation is not an element of first degree murder under the felony-murder rule. If the defendants and their victim would have been non-Indians, they would have been tried in state court, and under state law premeditation was required for first degree murder. The Court of Appeals held that this disparity between Indian and non-Indian prosecutions put the defendants "at a serious racially-based disadvantage," in violation of the equal protection requirements implicit in the fifth amendment. United States v. Antelope, 523 F.2d 400, 406 (9th Cir. 1975), *rev'd,* 430 U.S. 641 (1977).

112. 424 U.S. 382 (1976).

113. *Id.* at 390.

Under the analysis of these cases, diffentiating between tribal Indians and others for purposes of tribal criminal jurisdiction would not be an impermissible racial classification.[114] As long as tribes treat all tribal Indians equally, there is no equal protection violation.[115]

III. CONCLUSION

The *Duro* decision was a product of the present majority's activist concerns over assertions of tribal powers. The decision runs contrary to the fact that Congress is the proper body to weigh the policies for and against divesting tribal powers, not the courts. Congress should be careful in any attempt to reinstate the jurisdiction of tribal courts over inter-tribal crimes, for the present Court will clearly view even congressionally authorized assertions of criminal jurisdiction by the tribes over nonmembers with suspicion. In light of the present majority sentiment evidenced by *Duro* and other recent precedent, tribes should make efforts to settle disputes rather than litigate issues of retained tribal sovereignty before the Supreme Court.

Peter Fabish

114. Although *Antelope* dealt with congressional acts as opposed to tribal jurisdiction, tribal jurisdiction is implicitly defined by the federal jurisdictional structure.

115. The Eighth Circuit expressed some concern in Greywater v. Joshua, 846 F.2d 486, 488–89 (8th Cir. 1988), that inter-tribal animosities might cause nonmember tribal Indians to be unfairly treated. However, ICRA provides federal habeas corpus relief for people treated unfairly in tribal court. 25 U.S.C. § 1303 (1988). In addition to being irrelevant, the Eighth Circuit's comments about the animosities between the tribes are disrespectful of the tribes' ability to ignore such problems, if they exist, in the name of criminal justice, just as state courts are required to do for non-resident defendants.